Regency House of Wallingford, Inc. *and* International Chemical Workers Union Council/UFCW, Local 560C. Cases 34–CA–9895, 34–CA–9915, 34–CA–10075, and 34–CA–10101

May 31, 2006

ORDER REMANDING PROCEEDINGS

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On January 24, 2003, Administrative Law Judge Howard Edelman issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party both filed answering briefs to the Respondent's exceptions. The Respondent filed a brief in opposition to the Charging Party's cross-exceptions, and the Charging Party filed a reply brief in further support of its cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Consistent with our decision in *Dish Network Service Corp.*, 345 NLRB 1071 (2005), we have decided to remand this case to another judge in order for him or her to review the record and issue an appropriate decision.

In this case and in many others, the same judge has copied extensively from the General Counsel's brief in his decision. In each case, the judge then decided the case in favor of the General Counsel.[2] In the instant case, the vast majority of the statement of facts in the judge's decision and virtually all of its legal analysis were copied almost verbatim from the General Counsel's brief.

In *Dish Network,* supra, slip op. at 1, we said:

> "[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." *Indianapolis Glove Co*., 88 NLRB 986 (1950). See *Reading Anthracite Co.*, 273 NLRB 1502 (1985); and *Dayton Power & Light Co*., 267 NLRB 202 (1983).

Considering the instant case in the context of all of these cases as a whole, the impression given is that Judge Edelman simply adopted, by rote, the views of the General Counsel and failed to conduct an independent analysis of the case's underlying facts and legal issues.

We recognize that the Respondent did not specifically except to the judge's extensive copying. However, that fact does not, and should not, preclude the Board from taking corrective measures. It is *the Board's* solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality. The cited decisions of Judge Edelman fail to meet this elemental test.

We understand that this remand delays the issuance of a Board decision, and this may inconvenience the parties. However, we believe that the fundamental necessity to insure the Board's integrity outweighs these considerations.

In order to dispel this impression of partiality, we will remand the case to the chief administrative law judge for reassignment to a different administrative law judge. This judge shall review the record and issue a reasoned decision.[3] We will not order a hearing de novo because our review of the record satisfies us that Judge Edelman conducted the hearing itself properly.

ORDER

IT IS ORDERED that the administrative law judge's decision of January 24, 2003, is set aside.

IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for reassignment to a different administrative law judge who shall review the record of this matter and prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

MEMBER LIEBMAN, dissenting.

Although I do not approve of the conduct of the Administrative Law Judge, I am opposed to the Board disposing of a case on a basis that could have been, but was not, raised by any party.[1] Here, the Respondent has cho-

[1] The judge issued an erratum on March 12, 2003.

[2] See *Eugene Iovine, Inc.*, 347 NLRB 258 (2006); *CMC Electrical*, 347 NLRB 273 (2006); *Crossing Rehabilitation,* 347 NLRB 228 (2006); *Simon De Bartelo Group,* 347 NLRB 282 (2006); *Trim Corp.*, 347 NLRB 264 (2006); *Dish Network*, supra*; J.J. Cassone Bakery, Inc*., 345 NLRB 1305 (2005), and *Fairfield Tower Condominium Assn.,* 343 NLRB 923 (2004).

[3] The new judge may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by considering "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *RC Aluminum Industries,* 343 NLRB 939 fn. 2 (2004), quoting *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (internal quotation marks and citations omitted). Alternatively, the new judge may, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In doing so, the new judge will have the authority to make his/her own demeanor-based credibility findings.

[1] See, e.g., *Elevator Constructions Local 91 (Otis Elevator Co.*), 345 NLRB 925 fn. 2 (2005); *Metta Electric*, 338 NLRB 1059 (2003), enfd.

sen not to except to the judge's copying from the General Counsel's brief, or even generally to allege any bias on his part. Given this procedural posture, I believe the better course of action is to decide this case with dispatch based on our own independent review of the record, rather than to further delay the processing of the case and increase the costs to the parties, by remanding the case for assignment to another judge. By not raising the copying issue, the parties have implicitly indicated their willingness to have the Board decide the case as it now stands. Our independent review, coupled with the multiple rebukes of the judge, adequately addresses any concerns over the appearance of partiality.[2]

Margaret A. Lareau and *Quesiyah S. Ali, Esqs,.* for the General Counsel.

Richard M. Howard and *David S. Greenhause, Esqs. (Kaufman, Schneider & Bianco, LLP)*, for the Respondent.

Randall Vehar, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on June 11–12, and July 9, 2002, in Hartford, Connecticut.

Charges were filed by the International Chemical Workers Union Council, UFCW, Local 560C, AFL–CIO (the Union), against Regency House of Wallingford, Inc. (Respondent). A consolidated complaint issued on May 17, 2002, alleging various violations of Section 8(a)(1) and (5) of the Act.[1]

This case arises as sequel to a Board Decision and Order in Case 34–CA–9269. That background is critical to an understanding of this case, because it is a continuation of similar conduct, and contemptuous of the Board's order.

Upon the entire record in this case,[2] including my observation of the demeanor of the witnesses and full consideration of the briefs filed by counsel for General Counsel, counsel for the Union, and counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent operates a nursing home in Wallingford, Connecticut.[3] The Union was certified in October 1997 to represent a unit of full-time and regular part-time registered nurses, LPNs, and service employees, including CNAs. The parties entered into a 3-year contract which terminated February 19, 2002. Other than a simple duration clause, the contract contained no provisions concerning termination of the contract or the period for negotiation of a successor contract.

Administrative Law Judge Michael A. Marcionese issued a decision on February 21, 2001, in Case 34–CA–9269, in which he found that Respondent violated Section 8(a)(5) and (d) by unilaterally granting wage increases and bonuses during the term of the collective-bargaining agreement, and by refusing to supply requested information. These findings related to a March 2000 unilateral increase in starting wage rates for new employees, and increases in wage rates of existing employees earning less than the new starting rates, along with the granting of "signing" and/or "retention" bonuses to new hires.

In litigating that case, the General Counsel had sought as a remedy an order requiring the Respondent to bargain, at the Union's request, over the wage rates of all unit employees, based on the rationale that Respondent's unilateral increases had effectively reopened the contract's wage provisions. The judge declined to recommend such an order, reasoning in part that to do so would write a reopener clause into the parties contract, which would be beyond the Board's remedial authority. He did however state:

> Moreover, a cease and desist order and an order requiring rescission of any change, if the Union requests it, would be sufficient to remedy the unfair labor practices found here. *Of course if there is evidence that the Respondent takes advantage of this order, by publicizing it in a way to cast blame on the Union for the outcome, or otherwise attempting to cause employee disaffection from the Union, that would be another unfair labor practice which can be remedied in a separate proceeding*. To the extent that employees are adversely affected by the unfair labor practices found here or any remedy imposed, the blame lies solely with the Respondent for ignoring its statutory obligations to the Union. [Emphasis supplied.]

In light of the admonition, the judge ordered Respondent, upon the Union's request, to rescind the unilateral wage increases and the bonuses.

No exceptions were filed, and the Board issued a Decision and Order adopting the judge's decision on April 9. As yet, Case 34–CA–9269 has not been closed on compliance.

On February 27, 2001, shortly after receipt of the judge's decision, the Union orally requested rescission following a membership vote. As described in more detail below, this action began an effort by the Union over the following months to se-

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in part sub nom. *JHP & Associates, LLC v. NLRB*, 360 F.3d 904 (8th Cir. 2004); Sec. 102.46(b)(2) of the Board's Rules and Regulations ("Any exception . . . not specifically urged shall be deemed to have been waived.").

[2] See *Eugene Lovine, Inc.*, 347 NLRB 258 (2006); *CMC Electrical*, 347 NLRB 273 (2006); *Crossing Rehabilitation,* 347 NLRB 228 (2006); *Simon De Bartelo Group,* 347 NLRB 282 (2006); *Trim Corp.*, 347 NLRB 264 (2006); *J.J. Cassone Bakery*, 345 NLRB 1305 (2005); *Dish Network Service Corp.*, 345 NLRB 1071 (2005); and *Fairfield Tower Condominium Assn.*, 343 NLRB 923 (2004).

[1] Counsel for General Counsel moved to amend the complaint during the course of the trial by adding the following to par. 12 of the complaint: by letter dated May 4, 2001, Respondent, by Viola, blamed the Union for the rescission of wages and for failing to represent the interests of the employees in the unit; by letter dated May 10, 2001, Respondent, by Viola, held out the Union and its unit vice president as a wrongdoer and as failing to represent the interests of the employees in the unit. The amendment was granted.

[2] General Counsel moved in her brief to amend the trial record in accordance with "Attachment A" of her brief. This motion is hereby granted.

[3] It is admitted that Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

cure the same types of increases for longer term employees that Respondent had unilaterally given to the new hires and lower seniority employees. During this same timeframe, Respondent tried to convince the Union to forgo rescission of the wage increases. The parties' communications were primarily in a series of letters over the period from March to May 2002, and in these letters Respondent repeatedly and intentionally cast blame on and denigrated the Union and devised delays to implement such rescission. Throughout 2001, Lori Carver, the local union vice president and the highest-ranking officer in the unit routinely reviewed at weekly meetings the content of all Respondent's letters with the employees who were her stewards and made up her negotiating team, and occasionally with one or two other employees who attended. At times Carver also discussed the letters at work with employees.

In her letter dated March 19, Carver requested that Respondent's administrator, William Viola, bargain "concerning wages on the basis as proposed by the union." Carver included a proposal that those employees with over 5 years' seniority receive wage increases equal to the increases Respondent had unilaterally given to employees, retroactive to the date of the judge's decision, and that this be a "new rate base" from which any further increases may be bargained. Carver indicated that if the Respondent did not agree to this proposal by March 21, the Union would insist on rescission of the unilaterally granted wage increases, effective March 26.

By letter dated March 20, Richard Howard, one of Respondent's counsels, responded that Respondent disagreed with the judge's decision but would abide by it. Howard further stated that Respondent did not intend to bargain about employees' compensation at this time. However, he asked the Union to reconsider its position on rescinding the wage increase, stating:

> There is simply no reason to hurt the people receiving the new rate, just because the Administrative Law Judge did not rule exactly as you desired. Regency will not harm its employees; the union should not harm its members. With all due respect, you are dealing with peoples' lives; you should not cavalierly take their money away from them. Regency is not happy with the judge's decision, but will abide by same. There is no reason the Union cannot do likewise and avoid hurting their members.

Howard ended the letter by urging the Union to reconsider, stating that if the Union insisted on rescinding the increase, Respondent would comply, but that "it is entirely up to you whether you choose to harm your own members. In the interest of Regency's employees and residents, I hope you will reconsider." This represented clearly Respondent's first communication blaming the Union for any rescission and denigrating it by chastising it for hurting its members.

Thereafter the Union did revisit the rescission issue in a second membership meeting on March 22. Again the membership voted to demand rescission, this time by unanimous vote of 23 members.

By letter dated March 27, Carver wrote to Administrator Viola, noting the judge's admonition set forth above, that Respondent not rescind the wages in a way to cast blame on the Union. After considerable commentary, she acknowledged the Respondent's staffing problems, and stated that the Union was ready to meet with the Employer to deal with such problems.

By letter dated April 6, Respondent's counsel Howard responded to Carver's March 27 letter, and continued to denigrate the Union and criticize its representation of the unit. Incredibly, he first denied placing any blame on the Union, but stated, further denigrating the Union, that "In all candor, when a Union asserts it is prepared to act based upon a unanimous vote, when in fact perhaps one fifth (1/5) of the bargaining unit actually voted, you create your own dissatisfaction." He enclosed a petition opposing rescission that certain employees had purportedly provided to Respondent, and commented "that a substantial number of employees, far more than those that allegedly voted in favor of rescission of the wage increase, do not want the Union to demand said rescission." There were 20 signatures on the petition supplied to the Union. The letter went on to specifically rebuke the Union, stating "it is peculiar that while most unions pride themselves on helping the members they represent, your union has chosen as it legacy to punish its members by having their wages reduced." The letter also referred to the fact that the judge's opinion was not enforceable, and required the "imprimatur" of the Board. This statement is disingenuous since Respondent did not file exceptions to the judges decision.

On April 9, 2001, the Board issued its Order. On April 12, John Mendolusky, the Union's International representative, faxed a letter, in response to Howard's April 6 letter to Carver. The letter referred to the second membership vote to rescind, and cited the judge's admonition to Respondent to refrain from blaming the Union for rescission. Mendolusky noted that he had received the Board's Order that day, and demanded rescission of the wage increases effective Monday, April 16.

Viola did not respond to Mendolusky's letter until April 23, when he sent a letter (dated April 20) by overnight delivery. Thus, Viola's letter was sent 11 days after the request and 7 days after the effective date of rescission demanded by the Union. In his letter, Viola challenged Mendolusky's authority to request rescission and demanded written notice from an elected local union representative requesting rescission. Viola handed a copy of the letter to Carver on April 24, when she happened to be at Respondent's facility on her day off. She immediately submitted a handwritten demand for rescission. The challenge to Mendolusky's status as a union representative was disingenuous since Mendolusky had been servicing this unit since March 2000, at which time the Union had expressly notified the Respondent in writing that Mendolusky was now representing the unit in all matters. Mendolusky had been repeatedly in touch with the Respondent in this role over the course of the preceding year, and the Respondent had never previously challenged his authority. Respondent proffered neither evidence nor argument as to the basis for this challenge. I conclude under these circumstances, Respondent was clearly stalling the rescission.

However, on late Wednesday, April 25, and Thursday, April 26, Respondent revealed its purpose by enclosing with the weekly paychecks a memo dated April 25 from Viola to "all Regency House Staff," with Carver's handwritten letter attached.

The memo stated:

> As you are aware, the National Labor Relations Board (NLRB) issued a decision that found Regency House had violated the National Labor Relations Act by granting wage increases to certain employees without first notifying and discussing the increases with the Union. The NLRB ordered that as the remedy, Regency House would agree not to do this again in the future, and if the Union, at its option, requested Regency House would rescind the wage increase. *The other day your Union requested that we rescind this wage increase and lower the hourly rates for those employees who got the increase. Attached is the letter, which Regency House received from Lori Carver, your Union Vice President. Prior to implementing, we will discuss this further with our counsel and keep you advised.* [Emphasis supplied.]

I conclude that, prior to this point in time, Respondent had played at least lip service to its willingness to rescind, and had even cast its request for a demand from a local representative as if it was a mere technicality which was a precursor to implementation. In his testimony, Viola, when questioned by counsel for the Union, could provide no basis for his inclusion of the last line of the letter. It is clear the letter could only serve one purpose—to stir the pot of employee sentiments in the hopes of encouraging dissent.[4] It suckered the Union vice president, and unit member, Carver into the personal request precisely to split the bargaining unit. Meanwhile, Respondent still had not rescinded the wages and another pay period had passed without compliance with the Board Order.

By letter to Carver dated April 30, Viola acknowledged that Respondent had no legal alternative to rescinding the increases. However, Viola proposed resolving the situation by not cutting wages, and beginning to bargain for a new contract instead. He noted that the Union would be free to negotiate any changes and improvements that it desired, including wages, benefits and other terms. He stated that negotiations could begin immediately with regular meetings, and in return the Union would agree not to rescind the wage increases. Viola indicated he would delay implementing rescission until Respondent heard from Carver.

By letter dated May 2, Carver agreed to hold rescission in abeyance at that time, but explained the need for answers to some questions before the Union could begin negotiations. She noted Respondent's "delaying tactic" involving the challenge to Mendolusky's authority, as well as Viola's conduct in placing the blame for rescission on the Union and her. Carver then proposed that they meet to negotiate about starting pay, and that the starting point for negotiations would be specified hourly wage increases to be effective May 13, retroactive to March 30. Carver testified that if Respondent didn't agree to the Union's conditions and/or reply to the letter by May 11, rescission should be affected May 14.

By letter dated May 4, Viola responded to the May 2 letter, noting the February 2002 contract expiration date, and stating that Respondent was "simply willing to begin the negotiations of all aspects of a next collective-bargaining agreement now." After asserting that Respondent was not fixing blame, Viola then went on to do just that, by stating that "the inescapable fact is that the rescissions were neither the choice of Respondent nor the majority of our employees."[5] Once again, Respondent blamed the Union, indicating that the Union was not properly representing the unit, and thus portrayed itself as the champion of employees at the Union's expense. Viola testified that the assertion that rescissions were contrary to employees' wishes was based on what several employees had told him and on the signatures on the employee petitions attached to the April 6 letter. Yet the petitions that Respondent supplied to the Union only contained 27 unit signatures. In the process of explaining his count of signatures and of other dissident employees who spoke to him, Viola testified in a way that illuminates to the point of transparency all of the Employer's conduct from the time of the judge's decision until it withdrew recognition in November. In this connection, Viola spontaneously testified that "There is only about 80 or 85 people in the bargaining unit. I had 38 on the list. That means I only needed six more that I knew of, that weren't on the list, that would have put me over." This is a startlingly clear reflection of Respondent's intent to undermine the Union.

Carver replied by letter dated May 6. She also replied in two other letters dated May 6, one of which both Carver and Mendolusky signed, and which Carver, Mendolusky, and/or Local President John Flynn all signed. In her own letter, Carver again upbraided Viola for stalling wage rescission and tying to blame the Union and her personally for the rescission of the illegal wages. She also criticized him for a variety of conduct, including the Employer's refusal to remedy its violations, and its offer as a substitute to enter negotiations for a new contract conditioned on the Union withdrawing its demand for rescission. She further noticed that the Union could bargain for the next contract, but not as a remedy to the unfair labor practices cited by the Board. In the two other letters dated May 6, among other things, Carver stated that Attorney Howard had until May 11 to agree in writing to certain retroactive wage increases for members with 5 or more years of service who had not received the illegal increases. She further stated that absent agreement, the Union demanded rescission effective May 14.

Viola responded by letter dated May 10 in which he basically conveyed that Carver personally was not meeting the Union's duty of fair representation.[6] In this regard, he first accused Carver of attempting to "inflame an already tense situation," and then noted that "as someone who is the representative of the Regency House employees, you have an obligation to serve the interest of all the employees, not just the more senior employees of which you are one." He indicated that her

[4] Distribution of the April 25 memo is the first conduct alleged as violative in the amended complaint. However, the conduct from this point forward must be read in light of the other conduct between February and April 24, even though that falls more than 6 months prior to the filing of the charge.

[5] This letter provided the basis of the amended complaint par. 12(e) as amended at trial.

[6] The letter provided the basis for the amended complaint par. 12(f), as amended at trial.

demand went far beyond the Board's Order, and that although Respondent was willing to consider bargaining, it appeared that the Union was "unwilling to bargain unless we pay your ransom of giving increases and retroactive pay to senior employees." While stating that Respondent would implement the Union's request for rescission, he pointed to a purported unexpected hardship that this would have on employees, and proposed that the rescission be effective July 1 so employees could adjust their budgets. Again, he cast Respondent as champion of employees, and the Union as a villain. He added that if that was unacceptable to the Union Respondent would "implement the rescission forthwith." He then said that by this action they were removing any conditions which would prevent negotiations for a new collective-bargaining agreement. However, he added, again contemptuous and denigrating the Union: "Be assured that when negotiations commence, be it days or weeks from now or shortly before the end of the current agreement, Regency will make reinstitution of the wage increase, with retroactivity, a high priority."

In a May 11 response, Carver defended her conduct and criticized Respondent's attempt to undermine the Union. However, she stated that if Respondent was sincere in offering to negotiate a new contract, the Union could give this serious consideration, noting the need to resolve a newly filed ULP charge.[7] However, in an undated letter from Carver to Viola which appears to be in this timeframe Carver described Viola's May 10 letter as a refusal of the Union's conditions to forego rescission, stated that there could be no more delay in rescission, and demanded that rescission be made effective May 14.

In another letter of May 14, Carver expressly asked about the status of the rescissions, i.e., whether Respondent had taken appropriate action to comply.

In a letter dated May 17, Viola responded to questions posed by Carver in one of her May 6 letters, and for the first time explained a dramatic element of its proposal that Respondent was proposing to terminate the current contract and negotiate a new agreement, but that it was willing to leave the grievance and arbitration procedure in effect during bargaining. Viola stated that Respondent would impose no conditions on such bargaining, which could begin during the period of rescission, but that Respondent would be seeking restoration of the wage increase. He then referenced her May 14 letter, and acknowledged that they had no choice but to implement rescission.

However, Respondent did not make the rescission effective on May 14. Instead, Respondent made the rescission effective May 20, the beginning of the next pay period. The rescission was not reflected in the paychecks until those issued on May 31. Id. Despite the Union's May 14 letter expressly asking about the status of the rescission, Viola did not tell the Union about this delay until Carver called him on May 24, asking why it had not been received in the paycheck that day as she anticipated. At that time Viola told her, that he did not implement it effective May 14, because they couldn't do so in the middle of the workweek. At trial, Viola testified that he did not implement effective May 14 because this would have burdened the payroll with extra calculations associated with paying one rate on the first day of the payroll (Sunday, May 13) and a different rate on the second day (Monday). Thus Respondent again thwarted the Union, another pay period passed without compliance with the Board's Order. Respondent did so unilaterally, and failed to mention the matter even though, in his May 17 letter, he was replying in part to the Union's May 14 request for a status report.[8]

By letter of May 18, Mendolusky wrote to the Respondent, standing up for Carver's actions and criticizing Viola's. The by letter dated May 22, Mendolusky responded to Viola's May 17 letter, and informed Viola that the Union would consider meeting to bargain a successor contract. He challenged Respondent's assertion that it imposed "no conditions" inasmuch as Respondent was proposing to terminate the current contract during negotiations. Mendolusky countered with a proposal that the current contract remain in effect during any early negotiations for a successor agreement. He also proposed that it would be in both parties' interests to give high priority to certain issues, including starting wages, and that the parties consider immediate implementation of those items once there was tentative agreement on, and approval of, a successor agreement. Mendolusky proposed a course expressly independent of the ULP/rescission of wages, specifically that the wage rescission be unaffected by these negotiations. Finally, he asked that Respondent promptly notify the Union if the terms were acceptable.

As indicated above, after all this, the rescissions were finally implemented effective May 20, as reflected in the May 31 paycheck.

Derrick Sabo, a unit employee,[9] credibly testified Viola addressed a group of dietary employees in advance of the actual implementation, and explained that there would be a reduction of 30 cents in their hourly rates, and they would eventually get it back, and they could possibly get it back retroactively. Sabo did not recall whether Viola explained how those things would come about. Sabo believed there was a memo with the paychecks as well. Thus, by Sabo's testimony, Viola's version of this differed. Without expressly rebutting Sabo's account or reference his particular conversation with dietary employees, Viola testified that he did tell employees that hopefully down the road, they would be able to work something out and get them their wages back.

The agreement to enter early negotiations was the outgrowth of a conversation between Carver and Viola on June 7. The wage rescission had already been implemented effective May 20, in the pay May 31.

In this connection, on June 7, in the midst of the Union's consideration of these additional potential rescissions, Carver phoned Viola. She told him that the Union would be willing to stop pushing the starting rate issue with the Labor Board's

[7] The Union had filed Case 34–CA–9671, alleging that respondent violated Sec. (a)(5). The charge was withdrawn on June 22, based on a non-Board settlement.

[8] As set forth below, I conclude that Carver is a totally credible witness. Viola is not a credible witness.

[9] I was generally impressed with Sabo's demeanor. Moreover, although a unit employee he was not in favor of the Union. I conclude he had no reason to give false testimony.

compliance officer if Regency would sit down and negotiate a new contract with the Union. Carver told Viola that the Union wanted to bargain about wages, the rescission issue, and a new contract. She stated that she would sit down and set up guidelines, and make dates for future meetings for negotiations. Carver then gave the Respondent three possible meeting dates. Viola replied that he would get back to her. The next day, Viola told Carver that the Respondent had picked the June 18 meeting date. Then he stated that he was looking forward to starting negotiations and getting things done and the whole mess finally over with.

Carver credibly testified that the purpose of the meeting was to set up guidelines to start negotiations, and to set the table for negotiating. No conditions or limits were placed in advance on what matters would be addressed at the meeting. No contrary testimony was given by Viola. Attorney Kaufman admitted he was not aware of any conditions other than what he understood was the purpose of the meeting. The meeting was rescheduled for July 3.

In sum, Carver's testimony presented a credible, coherent account of her conversations with Viola and their agreement. This establishes that the parties had agreed to negotiate for a new contract, beginning with the initial meeting to set up guidelines and meeting dates, and to "set the table" for negotiations. Further, as referenced in her July 4 letter to Viola, this was an agreement to start negotiations *early*.

Viola never rebutted Carver's account of their conversation. Rather he essentially corroborated Carver's testimony.

In any case, Viola set the meeting up at a Marriott Hotel. It was customary for negotiating meetings to be held offsite like this due to limited space at Regency House. In anticipation of the meeting the Union's negotiating team met to finish up their proposals for what they wanted in a new contract.

The parties met on July 3. Present for Respondent were Attorney Arthur Kaufman and Viola. Present for the Union were Carver, Mendolusky, and the union team members, consisting of unit employees including Linda Cox. Carver testified that Mendolusky began the meeting by talking about why they were there to start negotiations, including setting ground rules for negotiations. Carver credibly testified that Kaufman then spoke up and stated that the Respondent's own purpose in being there was to reinstate wages, and that if "they" reinstated wages, then maybe the Respondent would think about going into negotiations. Kaufman further stated that the Employer was wrong, that they had broken the laws, but that the Union had no right to cast stones at the sons for the sins of the fathers. Carver spoke up briefly and stated that "we had a deal, that we were supposed to be in negotiations." Kaufman replied that he didn't care about going into negotiations, that they were there only to get the rescinded wages back. Kaufman then told the Union to make him an offer, and the parties broke for a union caucus. After the caucus, the Union proposed that the senior employees and the new employees both get matching wage increases. Kaufman stated, "[W]e'll see you" and walked out; he stated that they weren't there to negotiate, that he didn't care about any deal that was set up, that their sole purpose was just to get the wages back to the employees. Mendolusky and Cox essentially corroborated Carver's detailed and credible testimony.

Kaufman and Viola both testified about this meeting. Kaufman was often evasive and often answered questions by saying he could not recall. However, Kaufman basically corroborated the Union's team members' accounts of the essence of the message he gave to the Union in his ultimatum, although he provided several somewhat different versions. Viola corroborated that Kaufman had made wage restoration a precondition of moving forward. Viola's account did not contradict the Union's team.

As to whether Kaufman had blamed and denigrated the Union, Viola did not even testify on these points. Kaufman was evasive and claimed not to recall certain points. He did not deny making the statement about the Union visiting the sins of the father on the sons, but only testified that that was not his style. Kaufman did not directly rebut the allegations that the Union was hurting its members. Rather, he testified evasively that he had never said those words, but that he didn't recall what he said. As to whether he was angry at the session, he stated only that he doesn't usually get angry at negotiations.

Kaufman corroborated that Carver had spoken up at the meeting, and although he claimed he did not hear her say that she and Viola had a deal, he could not recall what she had said. Viola never rebutted Carver's account on this point.

The day after the aborted meeting, Carver wrote a personal letter to Viola, based on her feeling that she and Viola had a deal, that they were going into negotiations, that he had lied and that the Union was set up. Carver received no response. In her letter she set forth the context for, and substance, of their agreement to "set up guidelines to start negotiations early" and "to set the table for negotiating." That account is consistent with her testimony. Viola never replied to this letter.

There were no further meetings about restoring wages, reopening the contract or bargaining for a new contract. From this point forward, Respondent never negotiated with the Union. As set forth below, on November 13, 2001, the Respondent withdrew recognition.

On August 14, Respondent distributed to its employees in their paychecks a memorandum referencing both a deauthorization petition that had been filed in July and the contentions being raised by the Union in compliance about the additional rescission issues. It attached to the memo a copy of the Union's July 27 letter to the Region raising the additional rescission issue which it believed was a compliance matter associated with the Board Order in Case 34–CA–9269, and Respondent's written response to the Region setting forth its position. The memo informed employees that *the deauthorization petition had been placed "on hold" by the Region "pending a review of a claim by the Union that Regency House was not complying with the NLRB's decision in the prior unfair labor practice case, in that it should have further reduced the wages of certain employees." The memo then stated "obviously we disagree with the Union's contentions and we will make every effort to resolve this without further wage reductions.*" Emphasis supplied. Counsel for the General Counsel contends that Respondent held itself out as champion of employees and denigrated the Union as the "bad guy." Viola testified the Respondent was only trying to keep the Union informed of what was going on with the UD petition. I find the General Counsel's contentions

accurate.

In September, October, and November, the Union made several requests for information. Respondent did not supply any of this information. All the requests were made before the Respondent withdrew recognition on November 13.

In this regard, on September 14, the Union hand-delivered to the Employer a lengthy letter indicating its desire to meet to negotiate a successor contract, and requesting comprehensive information related to the unit employees and overall collective bargaining.[10] The request also overlapped to some matters involving contract administration, such as safety regulations that related to emergencies, a matter of immediate concern in view of the September 11 events. Although by letter of October 11, Respondent informed the Union that it would supply much of the information, it never did so despite the passage of almost 2 months before its withdrawal of recognition. Carver wrote to Attorney Howard on October 24, proposing meeting dates for the start of negotiations and expressly posing followup questions and clarifications on several of points advanced by Respondent in its October 11 response to the information request. However, Viola still never replied in any way. Thus Respondent ignored the requests and bided its time.

At trial Viola's principal explanation for the failure to supply the information was that after its October 11 response, Respondent was compiling the information but that shortly thereafter it got the petition from employees to decertify, making the information request moot. However the decertification petition was not supplied to Respondent until a month later, about November 13. Moreover, on cross-examination by union counsel, Viola's testimony about compiling information was completely eroded. He admitted that all he had done was to ask a staff member to start compiling data on a few of the requested items, and he never determined whether she did any of that. Thus there is no evidence that anything at all was compiled. Moreover, although he testified that he felt the request was overly burdensome, beyond some of the responses in the October 11 letter, he never communicated with Carver about the request.

Carver brought the nature of the Respondent's response to the attention of her negotiating committee and her stewards, especially Linda Cox who had brought the Buczynski matter to her attention.

By letter dated October 10, the Union questioned Respondent about the continued existence of a bonus system for those employees who work four consecutive weekends, and requested a copy of such details of such bonus system, Respondent simply ignored this request and never responded with the negotiating team and stewards, as well as employee Linda Short, who had raised the issue.

By letter dated November 4, the Union requested the employee name and type of offense for all verbal and written warnings issued during the preceding 2 years. Again, the Union received no response to this request for information. Carver had asked for this information because there were a couple of employees who had been written up for attendance issues (tardiness and call-ins), and she wanted to explore the consistency of the Respondent's treatment, particularly as she believed that an employee with notorious attendance had never been written up. Sometime before this request, Carver had confronted Respondent on the issue of disparate treatment of the latter employee. Although Carver was primarily interested in tardiness and absenteeism, the information also had potential value for grievances on other types of discipline down the road. Respondent never responded. Carver discussed the lack of response with Cox, who was an employee and negotiating team member.

At trial, Viola gave no explanation for his failure to respond to this request.

On October 19 and 20, Respondent by its admitted agents, Trish Thomas and Gina Pruhenski, conducted meetings with all Respondent's unit employees. Such meetings were conducted 3 days before the window period to file a decertification petition. The window period was October 23 to November 21. It is significant to note that 29 of the 51 signatures on the employee petition on which the Employer based its withdrawal of recognition, discussed below, were dated on or after October 19; the remainder were dated October 18. Respondent's witnesses involved in scheduling the meetings, Thomas and Pruhenski, gave no explanation for Thomas' choice of the October 19 meeting date, other than that Fridays were good days for such meeting. In fact, this was Thomas' first meeting with the Regency unit employees in the 5 months since she had been working at NHCA.[11]

Shortly before the meetings, employees were notified by a posted notice, as well as orally. The written notice stated that Thomas was there to meet with employees about their concerns. In advance of the session attended by unit employee Linda Short, Thomas told Short that she was meeting with employees to see if they had any issues or concerns, and to see if employees had any suggestions to make Regency House a better place to work. At the session itself, Thomas continued this theme, stating that she knew morale was low, and that she wanted to know if there were any issues or suggestions that would make Regency a better place for the employees to work. At the session attended by unit employee Linda Cox, Thomas introduced herself and told employees that she was there to listen to any concerns they had, and that employees could say whatever they wanted. At the meeting, Thomas stated that she was new, and that she was there to introduce herself and to find out if there were any problems or concerns at Regency House, and to see if they could make any thing better for the people there.

Unit employees and others in attendance then voiced their ideas and complaints, speaking up on a wide range of topics, many of which entailed wages, hours, and working conditions. As set forth below, this is established by the testimony of several employee witnesses, Carver, Cox, Short, and Sabo as well as representative Pruhenski. On many points, this testimony is corroborated by typed and handwritten notes of Pruhenski and Thomas.

In this regard, according to Cox, Thomas opened up the floor and employees voiced a variety of complaints—one employee

[10] For particulars see GC Exh. 27.

[11] NHCA, National Health Care Association, is the management consultant used by Respondent, and these representatives are admittedly its agents.

complained about excessive use of per diem and "pool employees" (i.e., staff from outside agencies), excessive paperwork, another employee asked for a raise, and Thomas replied that she couldn't do anything about that at this time. At the meeting which Carver attended, workers raised issues of benefits, wages, and wage rescissions. At the meeting Sabo attended, he raised the issue of vision insurance, and another worker raised the issue of money. At the meeting Short attended, workers raised issues about better data on pay stubs concerning leave time and the need for vision care, and safety issues. Respondent's agent Pruhenski testified, consistent with her notes, that workers commented about scheduling and favoritism, the need to treat people fairly, lack of vision insurance, the limits of dental insurance, an overwhelming workload, the need to raise wages, and one employees excessively high payrate.

After hearing employees' comments, Thomas told employees at several sessions that she would look into the matters raised and get back to employees; at some sessions, Thomas said she would see what could be done. In this regard, at the end of the session Cox attended, Thomas told employees that she had listened to what employees said, and she would get back to them. Similarly, at the session, which Short attended, Thomas stated that she would bring the employees' concerns to the appropriate people, and get back to the employees at a later time. During the session Sabo attended, after Thomas asked what employees would like to see happen, she stated that she would look into matters and see what she could do. In fact, when he raised a question as to vision insurance, Thomas said other people had asked about that and she would see what she could do and look into it. Similarly, at the session Carver managed to attend, Thomas stated that she would take their problems and concerns and try to do what she could with them.

Neither Pruhenski nor Thomas expressly rebutted the testimony of the unit employee witnesses as to the way the meetings were introduced or as to her comments about what she would do with the information. Thomas initially testified as an adverse witness that she started off the meeting by explaining that she was as of May, and that she was trying to visit every facility over the following year and that she was there to learn about how the facility operates. Yet she never testified that the purpose of the meetings was "to improve facility efficiency and patient/resident care" as was set forth both in Respondent's answer to the complaint and in Respondent's May 2, 2002 position statement to the Region in the underlying investigation. Given the wide range of comment by workers which Thomas listened to were mostly concerning terms and conditions of employment, rather than patient care, it is clear that the meetings were intended to solicit the employees concerns with terms and conditions of employment, rather then patient care. When called by Respondent, Thomas testified generally that when she holds meetings like this, it is her practice to tell employees she can't promise to fix things, but that she routinely says she will take information back to management. Yet Thomas never denied saying to the Regency House unit employees that she would see what could be done and get back to employees.

Significantly, at the session Carver attended, Thomas made absolutely no mention of Respondent's duty to negotiate with the Union over all the matters being raised by employees—issues of benefits, wages, and wage rescissions. Thomas ignored the Union's status even when Carver interjected that certain money could be saved on pool employees by negotiating wage increases for unit employees. Rather, Pruhenski's testimony indicates that at least at the session with dietary employees, when workers raised financial issues and incentive issues, Thomas immediately commented that she could not influence them either way concerning the Union.

Thomas made a comment to Sabo at the meeting he attended about there being steps to take if they were dissatisfied with the Union. Sabo gave credible, unrebutted testimony that with respect to the Union, Thomas actually asked him "if we thought about it." Although the phrasing of Sabo's answer is awkward, it is clear Thomas was asking what employees thought about the Union. I find his testimony is particularly credible as he expressed opposition to the Union, and he is a current employee.[12] Furthermore, according to Pruhenski, at that same session with dietary employees, Thomas did tell employees there were steps to take if they were dissatisfied with the Union, with the caveat that Respondent could not try to influence them one way or another regarding the Union, and that Thomas gave them the facts regarding the options and the process. However, Pruhenski claimed she could not recall what the options or process were. Pruhenski's testimony directly contradicts Thomas' testimony that she never told dietary or other unit employees that if they were dissatisfied with the Union there were steps they could take.[13]

Also, the context in which these sessions were held is disclosed by the extensive discussion among department heads and Thomas, at the department heads' session on October 19, concerning the Union's status and decertification. Pruhenski credibly testified,[14] consistently with her notes, that at their meeting with Thomas, the department heads made multiple comments about the Union, employee sentiments about the Union, and friction among employees concerning the Union, and commented that the staff had the numbers they need to get the Union out, but they just didn't know how. While these statements to these nonunit supervisors may have been permissible, they show an administrative focus at this point of time on the status of the Union and how workers could decertify it.

The fact that Respondent's focus was on this decertification issue at this time, and a signal of the purpose of these meetings, lies particularly in the nature of Pruhenski's synopses she placed at the end of her notes of each session. The notes of two of the sessions with unit employees—for dietary staff and for licenses staff—as well as the one for department heads describe the groups feelings about the Union. In one instance the comment associated with the dietary group began "This group was unhappy with the Union." As to the licensed staff, the comment was "The nurses appeared to be much more supportive of the Union than the other departments. These notes were forwarded to several individuals in the management hierarchy,

[12] *Flexsteel Industries,* 316 NLRB 745 (1995).

[13] I conclude such significant contradiction seriously reflects adversity on Thomas' credibility.

[14] Pruhenski's testimony, being an agent of the Respondent, is an admission.

including one of the top management officials, Marvin Ostreicher.

The ultimate proof of Respondent's purpose to solicit grievances and imply that employees would be granted benefits lies in memoranda to employees dated February 19, 2002 referring to the October 19 meeting. In this regard, at some point after February 19, the Respondent distributed to employees a memoranda "To All Regency House Staff" from Administrator Bill Viola.

It stated in part as follows:

> Back in October staff meetings were held with Trish Thomas, director of Human Resources for National Healthcare and Gina Pruhenski, Human Resource Service Manager. They recorded your comments, questions and concerns and typed them up and shared them with me in order to address some of the issues and formulate a response. Some of the issues will be responded to privately or in small groups due to the fact that they were personal in nature or that the response may involve confidential information.

At more than one of the meetings people asked about vision insurance, and also improved dental insurance. Trish Thomas has advised me that she has been gathering information and will be discussing them with the executive committee.

In this memo, Viola went on to discuss a number of points, including the possibility of a paid on-call CNA, the issue of favoritism in scheduling, CNA assignments, and staffing, paperwork burdens, and incorrect paychecks.

Meetings like these, soliciting employees' comments and grievances, were not the regular practice of the Respondent. Carver testified that meetings like this had not been held before. Short testified that she did not recall having previously attended any meeting with NHCA representatives where employees discussed issues. Cox testified that since the Union came in [i.e., 1997], when she was at work, Respondent has not had any open meetings with administrators at which workers aired complaints and that she hadn't even been to a meeting with a NHCA representative in 10 years. In fact, Respondent proffered no evidence that in the 4-year period between the Union certification in 1997, and these October 2001 meetings, it had held any meetings like this at Regency House.

On November 13, a decertification petition in Case 34–RD–289 was filed by Jasha Day, a unit CNA. On that same day, Respondent faxed to Mendolusky, and handed to Carver, a letter stating that a majority of the unit no longer wished to be represented by the Union, and that consequently Respondent was withdrawing recognition effective upon the expiration of the current collective-bargaining agreement. A similar announcement was posted for employees. This measure was taken following receipt of a copy of an employee petition from employee Heidi Becker which Viola testified he probably received on November 12 or 13. As of November 13, the Employer's payroll listed 91 unit employees. If the Union were to succeed in including Buczynski, whose supervisory status is challenged, then the unit would number 92. As noted above, 51 signatures appear on the employees' signed petition, including one for Buzcynski. Counsel for the General Counsel represented at trial that the General Counsel was not challenging the sufficiency of the employee petition to establish the facial lack of majority status of the Union.

Of the 51 employee signatures, 26 were of employees whose wages were rescinded in May, most were for amounts ranging from 5 cents to $1.60. Among those signers whose wages were rescinded were RD petitioner Tasha Day and Heidi Becker.

After this, consistent with the withdrawal of recognition, Respondent admittedly declined to bargain concerning a successor agreement.

Upon the expiration of the collective-bargaining agreement on February 19, 2002, Respondent instituted new terms and conditions of employment, including wage increases.

As admitted in its answer to the complaint, it (a) instituted weekend bonuses; (b) increased general wages and starting rates; and (c) restored wage increases which had been rescinded in compliance with the Board's Order in Case 34–CA–9269. In fact, the Respondent restored the rescinded wages effective February 19, with notice to employees moments after the contract expired. The notice communicated the tone of the Respondent's exuberance at having escaped the Union and gotten its way, first referring the withdrawal of recognition and then stating "I am pleased to announce that effective today we will be implementing the following adjustments: . . ." followed by four bulleted items, starting with "First, we will restore the prior wage rescission to the affected employees!" The memo went on to announce implementation of 35-cents-per-hour for certain staff other than nurses, and then a 50-cent increase for all unit RN's and LPN's, and adjustments in hiring rates. While the increases were not exactly what the Union had been requesting in 2001, they reinforced the message that had been delivered at the October meetings—that if the workers abandoned the Union, the Respondent would take care of them.

Analysis and Conclusion

Based on my reading of the record, and my credibility resolutions, I conclude that for the most part there are no real significant disputes as to the facts in this case. Based on my reading of the briefs of all parties, and the cases cited therein, I find counsel for the General Counsel's arguments to be persuasive.

In the prior case, the Respondent's unlawful wage increases and bonuses to new hires in March 2000, divided the unit into two groups, newer employees who had received the improper increases, and senior employees who had not. As a result, the Union was placed in a classic "no-win" situation, because whether or not it asked the Employer to rescind the unlawful wage increases under the Board's Order, it was in danger of losing the support of at least one group of unit employees. Respondent, in this case, took advantage of the situation it had unlawfully created by engaging in blatant and unlawful conduct including statements to the unit employees that made it appear that the Union was not representing the interests of the newer employees who had received the unlawful increases. Respondent with premeditation, effectively drove a wedge between the Union and one segment of the unit. Throughout the period of February–November, it knowingly and unlawfully kept pounding on that wage, frustrated good-faith bargaining, and finally engaged in direct dealing with it employees. Thus, not only

was a wedge driven between the Union and one group of employees, but its ability to represent all unit employees was fractured by Respondent's conduct.

These intentional and carefully planned unfair labor practices had the inevitable effect of undermining the Union and causing employee disaffection. Based on established Board doctrine, Respondent's conduct in 2001 tainted the employee petition, so that Respondent was not justified in withdrawing recognition from the Union.

A two-part analysis follows, showing that Respondent committed multiple violations, and that under Board standards the petition was tainted. Respondent further violated the Act by making unilateral changes after it improperly withdrew recognition.

Denigrating the Union

Respondent's unfair labor practices consist of several violations of Section 8(a)(1) for denigrating the Union in the eyes of employees. It also violated Section 8(a)(1) by soliciting grievances with promises of benefits and improvements if employees rejected the Union. Further, Respondent violated Section 8(a)(5) by bypassing the Union and direct dealing, by bargaining in bad faith, and by failing to supply relevant information, and unlawfully withdrawing recognition from the Union.

An employer who denigrates the Union in the eyes of employees violates Section 8(a)(1). See *Lehigh Lumber Co.*, 230 NLRB 1122 (1977) (employer violated Sec. 8(a)(1) when it remarked that the union was no good, was "screwing" employees, and that employees ought to look for another union); *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982) (employer's remarks to worker that it would be union's responsibility if employees did not get a raise and that union was indifferent to welfare of employees); *Carib Inn San Juan*, 312 NLRB 1212, 1223 (1993) (employer's statement that union did not back up employees and should have obtained certain moneys for employees, and that no union could defend them); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995) (supervisor told employee that union could not help a discharged employee get his job back because it was too weak, it had no money and had a lawyer with Alzheimer's disease, and that the employees should have listened to management and not voted for the Union); *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987) (employer's disparaging statements against the union were one of the elements of conduct used to "orchestrate and create heightened animosity, dissatisfaction, and hostility towards the union and discourage support for, and cause disaffection from, the union").

Here the Respondent did so by a variety of conduct described above and discussed below. Some of the denigration was quite direct, such as Attorney Kaufman's statements at the July 3 meeting. Other denigration was more subtle. Even where some of the individual instances on denigration were subtle, and less colorfully framed than in the cited cases, that does not diminish the conduct so long as the message was clear to employees. In this case the message was clear, given the context of the other unfair labor practices, and Respondent's constant repetition of the same theme. See *Parkview Furniture,* supra (context included action in addition to the disparaging statement).

Certain conduct, such as the letters in the March–May period and Viola's comments to Carver, while facially directed to Lori Carver of the Union, were coercive as to all unit employees. Carver herself is a unit employee, and thus coercive action directed against her must be taken as coercive to all unit employees. See reasoning in, e.g., *United Broadcasting Co. of New York,* 248 NLRB 403 (1980) (threat to one employee sufficient to set aside election, given reasonable expectation that statement will be disseminated and impact carry beyond person to whom threat directed); *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968); *Intercontinental Mfg. Co.,* 167 NLRB 769 (1967). Further, Respondent should have reasonably foreseen that in order to formulate union policy and action, Carver, as a union steward would be reviewing its communications with unit employees, union members, and those employees serving on the Union's team. The record evidence is clear that Carver, in fact, reviewed all Respondent's correspondence with her negotiating team and stewards. Carver related to some employees the conversation Viola had with her in the context of Dee Hammonds's insurance problems. She also reviewed with her team and stewards the failure of Respondent to reply to the information requests or supply information. Although proof of dissemination of these comments or conduct is not required to establish 8(a)(1) violations, there was considerable dissemination. See *United Broadcasting Co.,* supra.

When read as a whole, the facts concerning the stalling of rescissions is clearly established.

The Respondent in its March 20 letter, after stating that it would abide by the judge's decision, first asked the Union to reconsider rescission. Then, after issuance of the Board's Order on April 9, after the Union on April 12 reconfirmed its request to rescind, Respondent simply ignored the Union's request for 11 days and then threw a clearly artificial obstacle in the way by its bizarre challenge to the international representative's authority. These tactics carried the Respondent past two pay periods in which the rescission could have been effectuated.

Thereafter, in the period directly covered by the amended complaint, Respondent stalled the process again by proposing in its April 30 letter that the parties begin bargaining for a new contact instead of rescinding wages. It thereby secured a delay while the Union considered this proposal and asked for more details. At the same time, Respondent never clearly explained its proposal, and never bothered to explain until May 17 that its proposal entailed terminating the current contract and leaving the Union without any contract during negotiations.

In its May 10 letter, Respondent also sought to further delay rescission until July 1, purportedly so that employees could adjust their budgets. Although the Union did not agree, Respondent managed surreptiously to secure another delay by ignoring the Union's legitimate demand that the illegal wages be rescinded effective May 14. Without raising the matter with the Union, Respondent unilaterally decided not to make the rescission effective until May 20, purportedly for administrative convenience. It even left the Union to discover the delay on its own, keeping it in the dark even in the face of the Union's request for a status report. By the time the Union found

out, another pay period had slipped by.

All of these delays had a foreseeable effect of making the Union look weak and ineffective. The Union was not able to timely accomplish the rescission to which the Board's Order entitled it. These delays suggested the futility of union membership. See *Horizons Hotel,* supra, 312 NLRB at 1223. The delays also had the effect of maintaining the rescission issue as a festering sore for the segment of the unit it would directly affect, when rescission could have been over and done with. In the meantime Respondent's other unlawful and calculated actions eroded the Union's strength by other means.

While successfully delaying rescission, Respondent in its March 19 and April 6 letters began to hammer away at the Union with the unlawful accusation which it repeated over the next few months—that the Union, contrary to its members' wishes, was harming its members by seeking rescission, and that it was the Union which was taking away employees' money. Having sown the seeds of disaffection, Respondent actually became a conduit of that claimed employee disaffection by forwarding to the Union a copy of a petition from employees opposing rescission.

Thereafter, in its April 26 distribution, Respondent made the first of its direct communications with its employees designed to blame the Union and to hold out the Union as a wrongdoer. The memorandum it distributed in paychecks along with Carver's letter did not simply notify employees of some action with respect to rescission, but rather made it crystal clear to employees that it had not decided what its response would be. There was no reason to send this message at all, and not surprisingly, Respondent came up with none at trial. See *Parkview Furniture,* supra at 971 fn. 104 (employer's conduct served no purpose but to denigrate the union.) In fact, after Respondent insisted in a letter from Carver personally and secured one. Viola then cleverly attached Carver's letter to its April 26 memorandum, to pillory her before employees. In this fashion Respondent kept the pot stirring, creating disaffection and holding itself out as the employees' potential savior, and the Union as the wrongdoer.

The Respondent continued in this vein in its May 4 letter to Carver by again claiming that rescission was not the choice of the majority of employees, and in its May 10 letter to Carver pronouncing her obligation to serve the interest of all employees, "not just the more senior employees of which you are one." Thus Respondent continued to disparage the Union by harping on the inadequacy of the Union. See *Horizons Hotel,* supra.

In its May 10 letter, after seeking to further delay rescission until July, Respondent harped on its plan to seek restitution of the rescinded wage increases in future bargaining. Thus, while it repeatedly paid lip service to its obligation to rescind, it made it clear that it would continue to resist any such rescission.

Sometime in May, Respondent then reassured employees that their wage rates would be restored, even though this remained an unsettled issue between the parties. Respondent was presenting itself as employees' protector at the same time that it was denigrating the Union.

In its second strategic communication directly with employees, its August memorandum, it notified employees not only that the UD petition was on hold, but, once again, raised the Union as the wrongdoer in certain ongoing compliance issues involving rescission.

In September, Administrator Viola continued Respondent's campaign to blame the Union—and blame Carver personally—by conveying to Carver, in the context of Hammond's insurance issue, that she was to blame for low wages in the facility. Blaming the Union in this fashion was denigration in violation of Section 8(a)(1). See *Billion Dollar Oldsmobile,* supra; *Horizons Hotel,* supra.

The July 3 Meeting

The July 3 meeting with Respondent's attorney, Kaufman, clearly and unequivocally established Respondent's intention to restore the wage increases lawfully rescinded by the Union and to denigrate the Union completely; to portray itself as the hero and the Union as the villain.

Respondent's entire conduct at the July 3 meeting it disparaged and denigrated the Union in front of the employees who served on the team, and thus it violated Section 8(a)(1). In particular, Respondent did this by Kaufman's diatribe using the dramatic Biblical language that the Union was "visiting the sins of the father" (i.e., Respondent) "upon the sons" (i.e., the employees). Although Kaufman testified it was not his style to make such a statement, I conclude this is not the kind of statement that employees would make up. That he made such statement is established by Carver and other union witnesses. Moreover, I conclude Kaufman, is not a credible witness. Aside from his implied denial of the Biblical quotation his testimony is littered with "I don't recall" to questions put to him on cross-examination which answers he should have recalled as the attorney who was in overall charge of Respondent's conduct in this case. Respondent did this by Kaufman's statements that the Union was hurting its members, and by his statement that the Union had taken the wages away from the people. Quite simply, the Union was not to blame for Respondent's compliance with a Board Order. Respondent's conduct in this regard, is just what the judge in his decision admonished the Respondent not to do.

As set forth in the facts above, there was an agreement to begin early negotiations for a new contract. Carver's *unrebutted,* credible testimony of her exchanges with Viola, in contrast with Respondent's conclusory testimony about the purpose of the July 3 meeting, establishes that agreement. Viola enthusiastically agreed to Carver's proposal for early negotiations for a new contract, beginning with a meeting to set up guidelines for, and to start, those negotiations. This was not, as the Respondent contended, an agreement to sit down at a meeting to determine whether there was a basis to go forward with early negotiations. There is no logic that the Union would abandon its claim to further rescission for a meeting like that, particularly when the parties had throughout April and May already hashed out the options. With the rescissions a "done deal," both Carver and Viola were ready to move forward. I conclude Respondent led the Union to believe there was an agreement to start the negotiations of a new contract early.

Carver acted on the agreement to negotiate early by finalizing proposals with her team on multiple issues. Viola acted in keeping with the agreement as shown by his continued ex-

pressed enthusiasm for "negotiations," and by setting up the meeting for an off-site location like that customarily used for negotiations, a site large enough to accommodate the parties' respective teams.

Thus, although neither party was required to commence bargaining at this time, the parties were free to do so and they so agreed. At this point the parties were moving forward with respect to negotiation of a successor contract. There had been no prior notice or agreement that the negotiations would proceed at this time only if the Union agreed to restore the rescinded wage increases. In fact, there were absolutely no preconditions. As there was nothing in the contract nor past practice to specify when negotiations for a successor contract would begin, the Union went forward with the July 3 meeting as the beginning of negotiations for a successor contract. In any case, having so agreed, when Respondent entered the first session of bargaining on July 3, it was required to fulfill its normal statutory bargaining obligations. See *General Electric Co.*, 173 NLRB 253, 255 (1968), enfd. as modified 412 F.2d (1969)[15] (applying good-faith bargaining requirements of Sec. 8(d) to early negotiations preliminary to a reopener).

But the Respondent did not meet those statutory bargaining obligations. When Kaufman first spoke he delivered an ultimatum—that they were only there to get the rescind wages back, and that if the wages were reinstated, then Respondent would think about going into negotiations. He imposed a precondition to bargaining which had never before been communicated to the Union. When Carver protested that she and Viola had a deal to negotiate, Kaufman cut her off, said he didn't care, and then forged ahead on his single track. Thus, Respondent reneged on its agreement and then refused to bargain over a successor contract unless the Union gave back the rescission of the wage increase.

A party may not hold future negotiations hostage to its own unilaterally imposed demands, even on mandatory subjects. *Caribe Stable Co.,* 313 NLRB 877, 888–890 (1994). Moreover, Respondent's ultimatum sought to let the Respondent undo its compliance with the Board Order, and thus the Respondent was unlawfully conditioning further negotiations on a "permissive" bargaining subject, i.e., compliance with that Board order. See *Laredo Packing Co.*, 254 NLRB 1, 18–19 fn. 42 (1981). See also *Griffin Inns,* 229 NLRB 199, 200 (1977); *Lion Oil Co. v. NLRB,* 245 F.2d 376, 379 (8th Cir. 1957); *Hartswell Mills Co. v. NLRB,* 111 F.2d 291, 292 (4th Cir. 1940).

Although, I conclude a violation of Section 8(a)(5) exists apart from the Respondent's intent or scheme, certainly Respondent's overall conduct at this session including the series of disparaging statements discussed above, reflects that its tactic was to resurrect, in front of the employees, its efforts to avoid the rescission which the Board had ordered. In this fashion, Respondent could attempt to eviscerate the Board's Order, and further its efforts to denigrate the Union in the eyes of employees.

Thus, all that took place both before and at this meeting clearly indicates that the Respondent was never truly interested in bargaining over the terms of the new agreement in July. Rather, the Respondent "sandbagged" the Union at the July 3 negotiating session. After agreeing to negotiations, the Respondent never informed the Union at any time before July 3, that a precondition to bargaining for a new contract was immediate agreement by the Union to restore the rescinded wage increase. As result of the Respondent's July 3 conduct, the message to employees was clear: the Union takes away existing benefits that the Respondent was prepared to grant and the Union cannot negotiate improved benefits for all employees. Nothing changed after that. Respondent walked out of the July 3 meeting and never negotiated for the new contract, or even supplied the necessary relevant information the Union needed to negotiate, at any time following July 3.

Respondent's July 3 conduct clearly exposed its premeditated unlawful campaign, commenced shortly after the issuance of the judge's decision, to first denigrate the Union in the eyes of the unit employees, and then demonstrate the Union's inability to negotiate any improvements in wages and benefits.

Solicitation of Grievance—the October 19 Meeting

I conclude Respondent's October 19 meetings with unit employees were clearly solicitations of grievances, and because the Respondent conducted them without notice to or involvement of the certified Union, they were classic instances of direct dealing in violation of Section 8(a)(5).

Respondent plainly chose to skip the statutory representative entirely, and to meet and deal with its workers directly to find out what their problems and grievances were. I find Respondent's conduct and comments at these meetings constituted solicitations of grievances with implied promises of benefits in a setting that was akin to an organizing campaign; where such meetings were not a current practice. Thus, I conclude. Respondent committed independent violations of Section 8(a)(1).

It is Board law that once a union serves as an exclusive bargaining representative, this "exacts the duty to treat with no other." *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 683–684 (1944). This principle has been applied in a variety of contexts in terms of an employer's communications with employees, prompting a variety of statements of such duty, including the following:

> It is well settled that the Act requires and [sic] employer to meet and bargain exclusively with the bargaining representatives of its employees, and that an employer who deals directly with its unionized employees . . . regarding terms and conditions of employment violates Section 8(a)(5) and (1) of the Act. . . . Direct Dealing need not take the form of actual bargaining. Going behind the back of the exclusive bargaining representative to see the input of employees on a proposed change in working conditions plainly erodes the position of the designated representative. . . . An employer violates the above proscriptions of the Act by "solicitation of grievances" and "direct dealing with employees over working conditions. *Allied Signal, Inc.*, 307 NLRB 752, 753–754 (1992). The law as expressed in *Allied Signal* is particularly applicable to the

[15] The modifications do not affect the authority as applied to the instant case.

facts of the instant case. See also *Anderson Enterprises,* 329 NLRB 760 (1999).

More recently, in *Permanente Medical Group,* 332 NLRB 1143 (2000), the Board assessed a "direct dealing" allegation by summarizing and using the criteria set forth by the judge in *Southern California Gas Co.,* 316 NLRB 979 (1995).

The criteria were:

> (1) That the Respondent was communicating directly with union-represented employees.
>
> (2) That the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining.
>
> (3) Such communication was made to the exclusion of the Union.

Applying either the *Southern California Gas* criteria, or earlier Board cases, which summarize prior Board law, it is clear that on October 19, 2001, Respondent engaged in direct dealing in violation of Section 8(a)(1) and (5). Turning to the *Southern California* analysis, all of the criteria are readily met in this case: It is undisputed that Respondent communicated directly with union-represented employees. In this instance it did so in multiple group meetings throughout the day.

The evidence establishes that Thomas and Pruhenski, Respondent's agents, held out to unit employees that Respondent could grant or change in wages, hours, and terms/conditions of employment. This is established in Thomas' statement that she wanted to see if she could make things better for workers. This is also established in Administrator Viola's post-February 2002 memoranda, which include both a reference to the NHCA representatives having recorded concerns voiced at the October 19 meeting and shared them with Viola "in order to address some of the issues and formulate a response," and statements that dental and vision benefits, topics raised at the meetings, were under review. These comments reflect that even back in October the meetings were cast in a way to lead employees to believe the purpose of these meetings was to establish or changes in wages, hours, and terms and conditions. Moreover, Thomas' and Pruhenski's meetings with unit employees were also for the purpose of undercutting the Union's role in bargaining. This is demonstrated by the following facts established at these meetings:

> (a) The meeting was held by the Respondent on the verge of the window for decertification, and no legitimate explanation has been given for this timing.
>
> b) At one session, Respondent's Human Resources spokesman actually asked about employees' sentiments about the Union when she asked one worker "if we [i.e., employees] thought about it."
>
> (c) That spokesman specifically identified for the employees the option of decertification.
>
> (d) That employees pro-and anti-union sentiments were questioned and distributed this to its management hierarchy.
>
> (e) That even in the face of the Local unit vice-president's assertion that certain matters should be bargained, Respondent's representative ignored the remark and never mentioned the need to bargain with the Union.
>
> (f) That the Employer's intent here is disclosed by Viola's own testimony that as he assed the situations in March and April 2001, he only needed a few more names to defeat the Union's majority status.

The communication of the October 19 notice of the NHCA meetings was to the exclusion of the Union. The Union received absolutely no notice of the meeting from Respondent, and it was only by chance that the unit vice president, the only officer of the Local on site, was able to attend one of the multiple sessions. In prior Board cases, notice to a certified collective-bargaining representative and the presence of union representatives has been an element militating against a finding of improper direct dealing. See, e. g., *FMC Corp.,* 290 NLRB 483 (1988).

Accordingly, I conclude by engaging in the conduct described above, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent's direct dealing violation effectively invalidates the October conduct.

However, independent of the issue of direct dealing in violation of Section 8(a)(5), the Employer's conduct with respect to the October 19 meetings constitute an independent violation of the Section 8(a)(1) as a solicitation of grievance with an implied promise of benefits.

Although, in an organizing setting, an employer's solicitation of grievances alone does not necessarily violate the Act, a violation of Section 8(a)(1) may exist where an employer expressly or impliedly promises to resolve the grievances or grant benefits. As stated in *Reliance Electric Co.,* 191 NLRB 44, 46 (1971):

> Where, as here, an employer who has not previously had a practice of soliciting employee grievance or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program or inquiry and correction will make union representation unnecessary. [Citations omitted.]

See also *Noah's New York Bagels, Inc.,* 324 NLRB 266 (1997); *Embassy Suites Resort,* 309 NLRB 1313, 1316 (1992); *Villa Maria Nursing Center*, 335 NLRB 1345 (2001); and *Lotus Suites, Inc. v NLRB,* 32 F.3d 588 (D.C. Cir.1994).

In contrast, here an employer establishes that it had a similar practice of soliciting grievances which predated the campaign, no promise will be implied merely from the conduct of the meeting. See, e.g., *Recycle America,* 308 NLRB 50, 56 (1992). Compare *Overnite Transportation Co. (Dayton, Ohio Terminal),* 334 NLRB 1074, 1111 (2001).

Applying these principles to the instant case, I conclude Respondent solicited grievances with an implied promise of benefit, in violation of Section 8(a)((1). In this regard, the setting herein is completely analogous to a union organizing campaign, the Union's majority status was at issue. The window period

for decertification was imminent, and the employer had, as disclosed by Viola's own testimony, been "counting heads" as early as March in order to try to challenge the Union's majority status. Moreover, Thomas actually asked an employee, Sabo, at one of the sessions what employees thought about the Union. Further, according to Pruhenski, during at least one of the meetings with unit employees, Thomas referenced the decertification option. The context is relevant. See *Overnite Transportation,* supra. Also, in the instant case, the "organizing" context is revealed by the department heads' extensive discussion of decertification at their session.

The unlawful purpose and substance of the meeting, is firmly established by Thomas' own comments to workers. She told employees that she was there to hear employees' concerns, and to see if they could make Regency House a better place to work. She stated that she would look into the matters raised, see what could be done and get back to employees. I find this was a transparent solicitation of grievances and implied promise of benefits, particularly in terms of her assertion that she would see what could be done and get back to employees. See, *Noah's New York Bagels,* supra (solicitation/implied promise of benefits found where employer representative questioned employees about their problems and promised to do his best to resolve them); *Reliance Electric,* supra at 46 (where there was no practice of soliciting complaints, violation found where employer stated that it would "look into" or "review" complaints, even though the employer did not commit to specific corrective action). See also *K-Mart Corp.,* 316 NLRB 1175, 1177 (1995) (promise of benefits inferred where employer, who had not engaged in discussions with employees about working conditions or problems until an organizing campaign, met with employees, listed problems concerning working conditions which employees had identified, and listened to employee suggestions on solutions); and *Majestic Star Casino, LLC,* 335 NLRB 407 (2001) (in representation case, Board found improper an employer asking employees about their problems and concerns, and stating that it would look into these things, even though there was no specific promise). Even satisfaction surveys without any comment from an employer about what would be done with them have been found violative in an organizational campaign where an employer had not used surveys before. *Villa Maria Nursing Center,* supra (surveys questioned employees concerning their satisfaction with handling complaints, benefits and interest in an alternative health plan, salary program; employees were asked to provide any thoughts they had regarding their working environment, supervisor, compensation, and benefits, etc.)

The existence of implied promises in the instant case is clearly proclaimed by the fact, that, after the withdrawal of recognition was effective, Respondent, by its February 19 memorandum, did get back to employees, responded to some of the issues raises, and specifically stated that dental and vision insurance benefits were under active review.

While Thomas in her testimony made much of her purported practice of telling employees that she cannot promise to fix things, she never testified that she had said that in this instance. She never denied telling employees she would see what could be done and get back to them. And although Pruhenski testified that Thomas always tells workers she cannot make promises, and implied that Thomas did so at the dietary meeting, her testimony was unpersuasive as it appeared to rest on presumption rather than actual recollection. None of the other witnesses who described these meetings mentioned any such statement. In any case, the Board has rejected attempts to avoid the clear implication of promised benefits simply because an employer mouths the statement that it cannot make promises. See *K & K Gourmet Meats,* 245 NLRB 1331, 1332 (1978), and cases cited therein, enf. denied in part 640 F.2d 460, 466–467 (3d Cir. 1981), *Raley's, Inc.*, 236 NLRB 971, 972 (1978).

Moreover, Respondent did not have any current practice of meeting with its employees in this fashion, soliciting grievances and remedying them. The only evidence proffered by the Respondent as to the practice were documents concerning certain meetings in the period 1995–1997, before the Union was certified, which was rejected as evidence by me and, thus, not litigated in any fashion. In any case, the Respondent proffered no evidence of any such practice at Regency over the 4 years before these October 2001 meetings.

Most significantly, the Respondent's conduct here must be read in the context of its entire course of conduct over 6–7 months denigrating the Union and undermining it at every turn. See *KOFY TV-20,* 332 NLRB 771 (2000) (considering the employer's entire course of conduct, violation found where employer, during a presentation to employees about unionization, asked for comments or questions, employees raised grievances, and the employer either said it would look into the matter or take care of it.) See also *Smithtown Nursing Home,* 228 NLRB 23 (1977) (violation in context of Respondent's hostility toward the Union).

I conclude on the overwhelming evidence that the Respondent's conduct of the October 19 meetings, and prior unlawful conduct described above, was part and parcel of its ongoing efforts to undermine the Union. The Respondent was soliciting grievances, implying that it would remedy them, and thereby undercutting the Union's representational status. I further conclude such violation was a violation of Section 8(a)(1).

Refusal to Supply Information

The Supreme Court held in *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956), that employers have an obligation to furnish relevant information to Union representatives during contract negotiations. The Supreme Court also held that the employer's duty "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. *Acme Industrial Co.*, 385 U.S. 432 (1967). An employers refusal to supply requested and relevant information is a violation of Section 8(a)(5), above.

Respondent's repeated failures to supply requested information represented blatant violations of its duty to bargain. As to the September 14 request, Respondent ignored the request even though on October 11 it had committed to supply much of the information. This information was clearly relevant to negotiation of the new contact, and in some respects to contract administration. Yet, 2 months after that commitment Respondent had still not supplied the information despite a followup letter from the Union. Respondent presented no credible reason for

such failure. I conclude Respondent was continuing to breach its duty to bargain concerning a successor contract. It had not met that duty back in July and it never did anything to meet the duty after July.

Respondent continued to ignore the Union's legitimate status. Except for one scrap of minor information, Buczynski's title and hire date, Respondent provided no information in response to the Union's October 3 request for details about Buczynski's job status. This was relevant to an important issue previously by the Union concerning Buczynski's disputed unit or nonunit status. Neither did Respondent supply any information in response to the Union's October 10 request for information concerning any bonus system—it completely ignored the request. Both categories of information were clearly relevant to active issues involving contract administration.

Finally, Respondent completely ignored the Union's November 4 request for copies of warnings for 2 years, and supplied no information whatsoever. This request remained relevant even after the November 13 announcement of withdrawal of recognition, because withdrawal was not to be effective for 3 more months, during which time the Union would continue to administer the contract. Although the Union's request was primarily aimed at discipline concerning attendance issues, Respondent never told the Union it considered the request overbroad as written. Thus the Union was denied interchange with Respondent on the scope of the request.

I conclude Respondent's conduct undercut the Union's legitimate role as bargaining representative, as it had done in so many other ways. Predictably, this would not be lost on the employees. Not only were several employees who served as stewards and/or on the negotiating team kept apprised of Respondent's failures to supply information, but a rank-and-file employee was kept informed as well about the failure to provide the bonus system information. The repeated failure to supply information was more than a technical violation. It was key to the Union's ability to prepare for negotiations and to represent the unit on an outgoing basis. Thus, I find the refusal to supply the information requested by the Union to be a violation of Section 8(a)(5).

Withdrawal of Recognition

Under current Board law, in the absence of certain types of unfair labor practices, an employer may withdraw recognition from an incumbent union only where it is able to prove a numerical loss of majority status. *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001).[16] However, the *Levitz* doctrines are expressly limited "to cases where an employer has committed no unfair labor practices tending to undermine employees' support for unions." Id. at fn. 1.

In this case, there are multiple serious unfair labor practices that had a pronounced tendency to undermine employees' support for the incumbent union. In fact, those unfair labor practices not only had that effect, but they were aimed at that result. Board doctrine concerning withdrawal or recognition in the face of unfair labor practices, and related issue of causation, is well established. In this regard:

> [A]n employer may not withdraw recognition from a union while there are un-remedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies,* 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices." *NLRB v. Williams Enterprises,* 50 F.3d 1280, 1288 (4th Cir. 1995). [Footnote omitted.]
>
> The issue then is one of causation.

Penn Tank Lines Inc., 336 NLRB 1066, 1067 (2001).

The Board in *Penn Tank Lines,* supra at 1067, outlined its assessment of causation in two settings, as follows:

> In cases involving a general refusal to recognize or bargain with an incumbent union, "the casual relationship between the unlawful act and subsequent loss of majority support may be presumed. "*Lee Lumber & Building Material Corp.,* 322 NLRB 175, 178 (1996), enfd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB 399 (2001). In other cases, the Board has identified several factors as relevant to determining whether a casual relationship exists. These causation factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.,* 271 NLRB 78, 84 (1984).

See also *RTP Co.,* 334 NLRB 466 (2001); *Wyndham Palmas del Mar Resort & Villas,* 334 NLRB 514 (2001); *Overnite Transportation Co.,* 333 NLRB 1392 (2001). As further stated by the Board:

> If a casual relationship is found between unfair labor practices and the loss of employee support for a union, the evidence on which an employer has based its withdrawal of recognition is said to be "tainted", and the withdrawal is unlawful. An employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union. [Citing at fn. 13, *Hearst Corp.,* 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (4th Cir. 1988). *RTP Co.,* supra.]

See also *Alachua Nursing Center*, 318 NLRB 1020, 1030–1035 (1995); *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998).

Because the Respondent here did not undertake a general refusal to recognize and bargain until after the employee petition to decertify, the *Master Slack* factors apply. Those factors are used primarily to determine whether there is a tendency of the conduct to interfere with the free exercise of employees Section 7 rights, and is not predicated on a finding of actual coercive effect. *Hearst Corp.*, 281 NLRB 764 (1986), enfd. mem. 837

[16] *Levitz* overruled longstanding prior Board law in which an employer could legitimately withdraw recognition based either on proof of a numerical loss of majority support, *or* on a *good-faith doubt* as to majority status. *Levitz,* supra. *Levitz* was applied prospectively. There appear to be no Board decisions involving the taint of ULPs which entail events occurring post-*Levitz.*

F.2d 1088 (4th Cir. 1988). Where certain unfair labor practices reasonably tend to encourage unit employees to sign a decertification petition, taint will be found. *Hillhaven Rehabilitation Center,* 325 NLRB 202 (1997), enf. denied in part mem. sub nom. *Rehabilitation & Healthcare Center of Cape Coral v. NLRB,* 178 F.3d 1296 (6th Cir. 1999) (posting of letter suggesting union representative had engaged in criminal conduct, and that employer therefore had no duty to bargain with the union, would reasonably tend to encourage decertification petition; application of *Master Slack* factors established a causal relationship between unlawful conduct and disaffection); see also *Wire Products,* supra (Board inferred that employer's multiple violations contributed to employee disaffection expressed in a petition, given nature of violations and foreseeable tendency to weaken employee support for the Union.)

Furthermore, individual employee sentiments cannot negate those findings of a causal relationship between the unlawful conduct and employee disaffection. See *Hillhaven,* supra (evidence of individuals' reasons for signing of decertification did not negate other factors which, under *Master Slacks,* established a casual relationship between unlawful conduct and disaffection; *Wire Products Mfg. Corp.,* supra*,* 626 at fn. 13 ("in assessing the tendency of unlawful action to cause employee disaffection, the Board applies an objective, rather than a subjective test"). See also *Hearst Corp.,* supra at 765 (where employer engaged in unlawful activity aimed specifically at causing employee disaffection with their union, its misconduct, we find, will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct). Thus, I, in the instant case, properly excluded as irrelevant any testimony by employees concerning their subjective basis for signing the decertification petition.

I conclude that based on the facts of this case and under these principles, there is a strong, indeed obvious, causal connection between Respondent's unfair labor practices and the employee petition on which Respondent relied in withdrawing recognition from the Union.

Turning to the first *Master Slack* factor, the length of time between the ULP's and withdrawal of recognition, here the Respondent engaged in a continuous series of unfair labor practices over the course of many months, culminating in the direct dealing and solicitation of grievances at the very moment that the employees' decertification petition was being circulated. The repeated violations right up to the decertification petition supply a strong temporal nexus to the employee petition and the related withdrawal of recognition, particularly when the character of the unfair labor practices are considered. See, e.g., *Wyndham Palmas,* supra at 519. Beyond the unlawful conduct in Respondent's communications in April and May, within the 3 months before the employees signed their petition, Respondent had:

(a) Pulled the rug out from under the Union at the July meeting and again blamed the union for the rescissions.

(b) Denigrated the Union in August in its memo.

(c) Blamed Carver again in September.

(d) Ignored the Union's information requests in the period September–November.

(e) Engaged in direct dealing and solicitation of grievances/implied promises of benefits on October 19, immediately before the bulk of signatures were entered on the employee petition.

The direct dealing unmistakably communicated to employees that the Union was not necessary, and as such its timing is particularly significant. See, e.g., *Wyndham Palmas,* supra.

Evidence of causation linked to the second *Master Slack* factor, i.e., the nature violations, including the possibility it will have a detrimental or lasting effect, is also compelling. The wage rescission would have to be considered a dramatic event for any affected employee, because the Respondent continuously blamed the Union for it through the spring and summer of 2001. Moreover, blaming the Union, in direct contravention of Judge Marcionese' decision, had to have a lasting detrimental effect on employees. The same may be said of the other instances of denigration described above which sent the message that the Union was not representing the interests of employees.

In the contest of all that had happened, the fact that the Respondent on July 3 precluded the Union from bargaining as agreed is equally as likely to have had a serious detrimental and lasting effect on employees perceptions of their Union. The Union simply could not effectively represent employees given this treatment by Respondent. Also, by the time the Respondent had become entrenched in its pattern of ignoring the information requests and failing to supply the information, employee perceptions of their Union were irrevocably damaged for the long term. The direct dealing was certainly detrimental and of lasting affect. Moreover, it occurred so close to the petition signing and the withdrawal of recognition that the likely detrimental affect is obvious. The Board has found direct dealing and bypassing of a bargaining representative to have a lasting effect on employees. *Overnite Transportation Co.,* 333 NLRB 1392, 1396 (2001), and cases cited therein.

Application of the third and fourth *Master Slack* factors, the tendency of ULPs to cause disaffection and the effect of the ULPs on employees' morale, organizational activities and membership, demonstrates another strong casual link between the ULPs and the employee petition. As the Board has stated, the final two *Master Slack* factors focus on the reasonable tendency of the conduct to affect employees protected activities. See *RTP Co.,* supra at 469. The Board has considered the tendency of the ULPs to alienate employees from the union and undermine employee confidence in their representative, as well as the tendency to have a negative effect on union membership. *RTP Co.,* supra; *Penn Tank Lines,* supra at 1068. In the instant case, the entire series of actions denigrating the Union clearly had the tendency to negatively effect the employee's confidence in their representative and their morale. How could employees think well of a Union when their employer was constantly blaming the Union for employees' misfortunes and accusing it of misrepresenting the interest of employees. Certainly, the Respondent's conduct cutting off the Union's right to bargain on July 3, ignoring the Union's bargaining status by ignoring information requests in the fall, and then bypassing the

Union and engaging in direct dealing at the October 19 meeting would have an overwhelming tendency to cause employee disaffection and affect their morale and organizational activities. See *RTP Co.,* supra (third and fourth factors under *Master Slack* satisfied where employer blamed union for preventing employees from receiving their customary annual wage increase, followed immediately by direct dealing concerning wages).

In sum, it is obvious that under any objective analysis, Respondent's unfair labor practices caused the employee disaffection and the decertification petition. Respondent here did just what Judge Marcionese admonished it not do and considerably more. It built on the division created in the bargaining unit by its unlawful acts in 2000, a division which was never cured because of Respondent's preconceived and contemptuous plan and efforts to drive an even deeper wedge between the Union and one segment of the unit, and compounded the problem by a new array of unfair labor practices in 2001. These actions had the foreseeable effect of undermining the Union and causing disaffection, and the Respondent also intended that effect.[17] They also caused the employee petition seeking to decertify. Accordingly, I conclude Respondent's withdrawal of recognition was not valid and violated Section 8(a)(1) and (5).

Thus, I further conclude that by withdrawing recognition of the Union, Respondent violated Section 8(a)(5).

Because the Respondent improperly withdrew recognition from the Union, the unilateral changes implemented after the point on February 19 that withdrawal became effective, constitute violations of Section 8(a)(1) and (5). This includes the following unilateral changes, all of which have been admitted or stipulated to by Respondent:

(a) Institution of a "weekend bonus."
(b) Increases in general wages and starting rates.
(c) Restoration of wages rescinded in compliance with the Board Order in Case 34–CA–9269.
(d) Institution of new shifts, i.e., the 4–8 p.m. work schedule.

Further, I conclude any other unilateral change effective after that date, and any other actions in derogation of the Union would also be violative.

CONCLUSIONS OF LAW

1. On the dates set forth below, Respondent denigrated the Union and violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) From about April 25 until about mid-May 2001, Respondent delayed in implementing the Union's request to rescind the wage increases as required by the Board's Order described above.

(b) About April 26, 2001, Respondent, by William Viola, enclosed with employees' paychecks a memorandum concerning the Union's request, pursuant to the Board Order described above for rescission of the unlawfully granted wage increases, along with a copy of the Union's letter requesting such rescission.

(c) By a letter dated May 4, Respondent, by Viola, blamed the Union for the rescission of wages and for failing to represent the interest of the unit employees.

(d) By a letter dated May 10, Respondent, by Viola, held out the Union as a wrongdoer and failing to represent the interests of the unit employees.

(e) About May conveyed to unit employees that the Union was not meeting its duty of fair representation.

(f) About July 3, 2001, Respondent, by its counsel and agent, in the presence of unit employees at a meeting, blamed the Union for the wage problems and held out the Union as a wrongdoer.

(g) About August 14, 2001, Respondent, by Viola, distributed to employees a memoranda concerning wage rescission issues and the status of a petition to remove union shop authority, and attached copies of Union and Respondent letters concerning wage rescission issues.

(h) About September 2001, Respondent, by Viola, informed its employees that the Union was responsible for employees' low wages.

2. On or about July 3, 2001, Respondent insisted, as a condition for bargaining with the Union for a successor collective-bargaining agreement, that the Union agree to restore the wage increases that had been rescinded effective May 14, 2001, pursuant to the Board Order described above in violation of Section 8(a)(1) and (5) of the Act.

3. Pursuant to lawful requests by the Union in letters dated September 14, October 3 and 10, and November 4, 2001, Respondent has failed to furnish the Union with the information requested therein, in violation of Section 8(a)(1) and (5) of the Act.

4. On or about October 19, 2001, Respondent unlawfully solicited grievances, and engaged in direct dealing with its employees in violation of Section 8(a)(1) and (5) of the Act.

5. On or about November 13, 2001, Respondent withdrew its recognition of the Union as the exclusive bargaining representative of the unit employees in violation of Section 8(a)(1) and (5) of the Act.

6. By instituting unilateral changes on or after February 19, 2002, after Respondent's withdrawal of recognition, described above, I find the following unilateral changes constitute a separate and independent violation of Section 8(a)(1) and (5) of the Act:

(a) Institution of a "weekend Bonus."
(b) Increases in general wages and starting rates.
(c) Restoration of wages rescinded in compliance with the Board's Order in Case 34–CA–9269.
(d) Institution of new shifts, i.e., the 4–8 p.m. work schedule.

7. Since on or about November 14, 2001, Respondent has refused to bargain with the Union concerning the terms of a collective-bargaining agreement to succeed the agreement expiring on February 19, 2002.

8. The unfair labor practices of Respondent described above

[17] See *Alachua Nursing,* supra (finding employer "undertook an intentional, premeditated course of action designed to undermine the Union as bargaining representative; among the conduct found to be so designed was employer's letter to Union saying it was disappointed that the Union would "deny our employees a wage increase," and then immediately posting all related correspondence for employees, was designed to undermine employee support for the Union.

affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act. To remedy the unilateral changes described in the conclusions of law, I shall recommend that Respondent be ordered to rescind such unilateral changes in connection with the general wage increase and starting rates, the restoration of wages rescinded incompliance with the Board's Order described above, and the institution of new work shifts, it granted, if the Union so requests. Respondent should also be ordered to rescind any additional changes made after Respondent withdrew recognition, if the Union so requests. I also recommend that Respondent furnish to the Union the information requested, described above.

Additionally, I recommend that Respondent recognize and bargain with the Union which is understood to bar any challenge to the Union's majority status for a reasonable time which will be no less then 6 months. *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Regency House of Wallingford, Inc., Wallingford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain collectively and in good faith with International Chemical Workers Union Council, UFCW, Local 560C, AFL–CIO (the Union), as the exclusive representative of its employees in the following appropriate unit, by making changes during the term of the parties' collective-bargaining agreement in any mandatory subject of bargaining contained in that agreement without the consent of the Union. The appropriate unit is:

> All full-time and regular part-time registered nurses, licensed practical nurses and service and maintenance employees employed by the Respondent, including certified nursing assistants, physical therapy aides, dietary aides, and housing and laundry employees; but excluding RN supervisors, office clerical employees, cooks, and guards, other professional employees and other supervisors as defined in the Act.

(b) Meeting with unit employees and soliciting grievances and or engaging in direct dealings with such employees.

(c) Denigrating the Union by delaying action on lawful requests for information made by the Union and by other written on oral communication to unit employees.

(d) Insisting, as a condition of bargaining with the Union for any successor bargaining agreement that the Union agree to restore the wage increases that had been rescinded effective May 14, 2001, pursuant to a prior Board Order.

(e) Failing or refusing to bargain collectively with the Union by making any unilateral changes in any mandatory or bargaining not contained in the prior collective bargaining without first notifying the Union and affording it a meaningful opportunity to bargain regarding the proposed change.

(f) Failing or refusing to bargain collectively and in good faith with the Union by failing and refusing to furnish the Union, upon request, with information relevant and necessary to the Union's performance of its statutory duties as the exclusive representative of the unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union for a reasonable time, which will be no less than 6 months.

(b) On request by the Union, rescind further "weekend bonus," wage increases in general and a starting rate restoration of wages rescinded in compliances with the prior Board's Order, and institution of new work shifts.

(c) Furnish the Union with the information it requested by its letters dated September 14, October 3 and 10, and November 4, 2001.

(d) Notify the Union in advance of any proposed changes in the mandatory subjects of bargaining and obtain the Union's consent before implementing changes to such subjects that are contained in the parties' collective-bargaining agreement and bargain collectively and in good faith, on request of the Union, before making any changes in mandatory subjects that are not contained in the contract.

(e)Within 14 days after service by the Region, post at its facility in Wallingford, Connecticut, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT meet with our unit employees for the purpose of soliciting grievances, and/or engage in direct dealing with such employees.

WE WILL NOT fail or refuse to bargain collectively and in good faith with International Chemical Workers Union Council, UFCW, Local 560C, AFL–CIO (the Union), as the exclusive representative of our employees in the following appropriate unit, by making changes during the term of the parties' collective-bargaining agreement in any mandatory subject of bargaining contained in that agreement, without the consent of the Union. The appropriate unit is:

> All full-time and regular part-time registered nurses, license practical nurses and service and maintenance employees employed by the Respondent, including certified nursing assistants, physical therapy aides, dietary aides, and housing and laundry employees; but excluding RN supervisors, office clerical employees, cooks, and guards, other professional employees and other supervisors as defined in the Act.

WE WILL NOT denigrate the Union by delaying action on lawful requests for information made by the Union and by other written or oral communication to unit employees.

WE WILL NOT insist as a condition of bargaining with the Union for any successor bargaining agreement that the Union agree to restore the wage increases that had been rescinded effective May 14, 2001, pursuant to a prior Board Order.

WE WILL NOT fail or refuse to bargain collectively with the Union by making any unilateral changes in any mandatory or bargaining not contained in the prior collective bargaining without first notifying the Union and affording it a meaningful opportunity to bargain regarding the proposed change.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union by failing and refusing to furnish the Union, on request, with information relevant and necessary to the Union's performance of its statutory duties as the exclusive representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercising of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the Union for a reasonable time, which will be no less than 6 months.

WE WILL, on request by the Union, rescind further "weekend bonus," wage increases in general and a starting rate restoration of wages rescinded in compliances with the prior Board Order, and institution of new work shifts.

WE WILL furnish the Union with the information it requested by its letters dated September 14, October 3 and 10, and November 4, 2001.

WE WILL notify the Union in advance of any proposed changes in the mandatory subjects of bargaining and obtain the Union's consent before implementing changes to such subjects that are contained in the parties' collective-bargaining agreement and bargain collectively and in good faith, on request of the Union, before making any changes in mandatory subjects that are not contained in the contract.

REGENCY HOUSE OF WALLINGFORD, INC.